SUPREME COURT, U.S.

MAY 12 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

AT WASHINGTON

OCTOBER TERM, 1966 7

Number ~~1382~~ 153

ATLAS PERRY, ET AL.,

versus

LAWRENCE COUNTY ELECTION COMMISSION, ET AL.,

J. P. KIMBRELL, Petitioner

A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

For Petitioner:
J. P. KIMBRELL,
West Point, Tenn.,
acting in his own behalf.

For Respondents:
HON. NOBLE L. FREEMON, SR.
and
HON. A. D. LINDSEY,
both of Lawrenceburg, Tenn.

FLORENCE HERALD PRINT

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THE OPINION

The opinion in this case was filed January 12, 1967, following which an appeal to rehear was timely filed. Said petition to rehear was denied on March 1, 1967. The opinion is reported in 411 SW2d 538.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1254 (1).

* * * * *

Your petitioner, J. P. Kimbrell, prays for a Writ of Certiorari to the Supreme Court of the State of Tennessee to review a judgment of the said Supreme Court of the State of Tennessee which affirmed a decree of the Chancery Court of Lawrence County in which your petitioner was enjoined from being inducted into the office of Judge of the Court of General Sessions for Lawrence County, to which office he was elected on August 4, 1966, by the voters of the said Lawrence County.

Your petitioner would show to this honorable Court that his election was duly certified by the Lawrence County Election Commission and that he was duly commissioned by the then governor, the Honorable Frank G. Clement, to enter upon the duties of the office, although the gubernatorial commission was intercepted upon its delivery at the court house by first class mail and was rifled and kept for a period of twenty-one days without the knowledge or consent of your petitioner. Petitioner would further show to the honorable Court that, on August 8, 1966, the Lawrence County Bar Association, under the presidency of one A. D. Lindsey, filed an action in Chancery Court asking for a declaratory judgment which would bar petitioner from holding the office to which he had been elected, the ground for contention being that petitioner was not licensed to practice law in Tennessee, which qualification was set forth in Section 12 of Chapter 55 of the Private Acts of 1943 as being necessary to holding the office in question. Petitioner admitted

what all citizens of the county knew, namely, that he was not licensed to practice law in Tennessee or elsewhere but insisted that he was eligible to serve the office legally and constitutionally on the grounds that the provisions of the Private Act which required him to be a lawyer were unconstitutional. The Chancellor overruled most of the contentions presented and declared petitioner ineligible to serve the office to which he had been elected.

Petitioner thereupon excepted and perfected an appeal to the Supreme Court of Tennessee which, as stated above, affirmed the opinion of the Chancellor. Petitioner is much aggrieved over the action of the Supreme Court of Tennessee, for which reason he comes before this court and files this petition for a Writ of Certiorari to bring this case and the record therein before this honorable Court for review and correction. He respectfully contends that in overruling his assignments of error the Supreme Court of Tennessee was much in error and that such error was highly prejudicial to him. Your petitioner files this assignment of error and brief in support thereof, which are offered and asked to be treated as a part hereof.

The premises considered, your petitioner prays:

First, that a Writ of Certiorari issue from this honorable Court to the Supreme Court of the State of Tennessee, directing said Court and the clerk thereof to certify and transmit to this honorable Court the entire record and proceedings in this case, including the opinion and judgment of the Supreme Court of the State of Tennessee;

Second, That the judgment of the Supreme Court of Tennessee be reviewed and the error complained of be cured;

Third, That petitioner have all such other and general relief as he may be entitled to under the Constitution of Tennessee and that of the United States.

ASSIGNMENTS OF ERROR

(1) The Supreme Court of Tennessee erred in establishing qualifications for judges of inferior courts above and beyond those set forth and defined in Article VI, Section 4 of the State Constitution.

(2) The Supreme Court of Tennessee erred in upholding the constitutionality of a Private Act which, under Article XI, Section 9 of the Tennessee Constitution, the General Assembly was not empowered to pass.

(3) The Supreme Court of Tennessee erred in conferring upon Courts of General Sessions powers and jurisdictions above and beyond those which characterized their constituent elements.

(4) The Supreme Court of Tennessee erred in nullifying a precedent exactly in harmony with the case at bar and using as a criterion, or a controlling case, one which had little or no similarity to the case at bar.

(5) The Supreme Court of Tennessee erred in withholding from and denying to your petitioner the rights and privileges guaranteed to him by the Constitution of Tennessee, by Section 1 of the Fourteenth Amendment to the Constitution of the United States and by Article IV, Section 4 of the same document.

ARGUMENT AND BRIEF

What is admitted privately but denied publicly by every lawyer in Tennessee is that all Private Acts in Tennessee are unconstitutional. The Tennessee Constitution is very explicit in declaring that the General Assembly shall have no power to pass any special legislation (Article II, Sections 8 and 9). This was clearly demonstrated when a group of citizens interested in some legislation relative to a Public Health Unit in

Lawrence County went to Nashville for the purpose of consulting with the Attorney General as to the feasibility of getting a Private Act through the Legislature. In view of the fact that certain opposition was to be expected from the Medical Association, they were frankly advised that a Private Act was not constitutional and that some formula more binding than a Private Act should be utilized. The confusion which stems from legislative attempts to pass special and private acts in Tennessee continues only because of the ignorance of the people concerning such matters and their lethargic attitude toward them.

In its judgment on the case at bar the Tennessee Court (Transcript, page 94) used **LeFever v. Ware** (211 Tenn. 393; 365 SW2d 44 1963) as a precedent and made it the controlling factor in its determination of the constitutionality or unconstitutionality of Section 12 of Chapter 55 of the Private Acts of 1943. We agree with the Court when it stated (Transcript, page 93) that the sole question involved was whether the Judge of the Lawrence County Court of General Sessions was required to be a person licensed to practice law in the State of Tennessee, but we violently disagree with the conclusion reached and with the case which was used as a precedent and the controlling factor. It is true in **LeFever**, just as in the instant case, that a non-lawyer was elected as Judge of an inferior court and that the local Bar Association asked for a declaratory judgment which would bar him from assuming the duties of the office. While your petitioner denies the constitutionality of the Private Act by which the inferior court in **LeFever** was created, the fact remains that it was created under a Private Act, just as was the Court in Lawrence County, and was functioning under its provisions. When the elected Judge's right to sit was challenged by the Bar Association in White County, the Chancellor, having worthy precedent for his actions, overruled the provision of the Private Act which required the elected Judge to be a licensed lawyer and declared him eligible under the law and the Constitution to hold the office to which he had been elected. The Bar Association immediately appealed to the Supreme Court of Tennessee, which Court, contrary to all expectations, reversed the decree of the Chancellor. This was a precedent which no one expected but which every lawyer

in the state much desired. It is worthy of note here that the decree of the Chancellor was based upon a precedent established sixteen years before and which should have been the controlling case in all subsequent cases of this nature.

The Private Act which created the Court of General Sessions in White County clothed the Court with powers and jurisdictions far above and beyond those of the Magistrate's Courts which it replaced. The Court was empowered to hear and dispose of divorce cases, to issue fiats and to interchange with both Circuit and Chancery. This created a cloud of confusion in the public mind so that the judgment of the State Supreme Court was much misunderstood by the people but was clearly discerned by the legal profession. The people did not know whether or why it was unconstitutional and did not understand why the Court denied the elected Judge the right to sit, while the legal profession understood both. The Court did not see how a layman could consider himself capable of dealing with divorce cases, fiats and interchangeability with Circuit and Chancery, but the common people could not see how a Court clothed with such extraordinary powers could be created from a combination of simple Magistrate's Courts. The people wondered why this simple court should require a lawyer to sit on its bench when a Magistrate's Court was never known to be presided over by a lawyer, neither did the law require a trial juror or a grand juror to be a lawyer.

The Private Act which created the Lawrence County Court of General Sessions created a magistrate's court, which is not a court of record and which does not have any of the extraordinary powers with which the White County Court is clothed. The two courts are entirely different both in structure and application. The Lawrence County Court is not empowered to hear and to dispose of divorce cases, neither is it empowered to issue fiats or to interchange with either Circuit or Chancery. Its only function is to take care of misdemeanors and such other petty cases as would otherwise clutter up the Circuit and Chancery dockets to the point where they would be much overloaded. When the State Court made **LeFever** the controlling factor in this decision its case fell flat, for there is hardly a point of similarity between **LeFever** and the case at bar.

A precedent for the case at bar was established by the State Court in 1947, although the 1963 Court belabored itself to argue it out of existence in **LeFever** and apparently sought to escape encumbrance with it. The precedent for the case at bar is that of **Kivett v. Mason** (185 Tenn. 558; 206 SW2d 789), the history of which case is substantially as follows: The office of County Judge for Claiborne County was created by Chapter 532 of the Private Acts of 1929 and no qualifications beyond those set forth in the Constitution were required of those who would sit as Judge of the Court. Eight years later, in 1937, an Amendatory Act was passed which required that the Judge of the County Court of Claiborne County should be a person licensed to practice law in Tennessee. In 1944, J. Kyle Kivett, a practicing lawyer in the county, sought and obtained election as County Judge. Some time later, the Claiborne County Bar preferred charges against him on grounds unknown to your petitioner and, after trial, he was permanently barred from the practice of law in Tennennessee. In view of the Amendatory Act requiring the County Judge to be a lawyer, those who had a personal interest in the matter immediately declared that a vacancy existed in the office of the County Judge and petitioned the governor to appoint a man to fill the alleged vacancy. The governor thereupon appointed Boyd Mason to serve the office. The highly complicated suit in Chancery which followed was finally resolved when Mason was declared to be the lawful Judge of the County Court. Judge Kivett appealed the case to the State Supreme Court and the clarity with which the Court saw the situation is evident from the straightforward opinion which came out of the case. The situation was one of the utmost simplicity. There were no hair-splitting legal questions involved but a simple question which called for and demanded a simple and straightforward answer. This is exactly what the Court gave and the positive and convincing arguments set forth by the judicial body left no doubt in anybody's mind as to where it stood. The constitutional law is set forth as follows:

(1) The fact that the Constitution, in providing for the appointment of special judges of the Supreme Court in cases where judges of such court are disqualified, required that men of 'law knowledge' be selected, con-

clusively establishes that it was intended to grant the right to select men other than lawyers to be judges of the courts for which such article provides.

(2) The constitutional provision that the judges of inferior courts shall be selected by qualified voters and that every judge shall be thirty years of age, a resident of the state for five years, and of the circuit or district one year empowers the voters to select whom they please so long as the constitutional requirements are complied with, and such requirements may not be abridged or taken away by the Legislature.

(3) Under constitutional provision that every Judge of inferior courts shall be thirty years of age, and a resident of the state for five years, and of the circuit or district one year and that the term of service shall be eight years, an amended statute requiring that the judge of the County Court of Claiborne County be a practicing attorney is unconstitutional.

Let the Court speak for itself:

"It is the insistence of Mason that in the preparation of the Constitution it was naturally assumed by its authors and draftsmen that the judges of our courts would always be lawyers and that our Legislature, by its subsequent enactments, has demonstrated that it so interpreted the Constitution . . . We think, however, that the Constitution on its face furnished affirmative evidence that its authors deliberately refrained from inserting a provision which would require that only lawyers be selected as judges of the courts for which Article VI provides. Nowhere in Article VI or elsewhere in the Constitution, insofar as we have been able to find, is there any reference to lawyers as to who shall be judges of our courts."

Again the Court declares:

"The words of the Constitution were chosen with great care. The very fact that in the above quotation the words chosen were those that 'men of law knowledge' rather than the word 'lawyer' or 'attorneys' necessarily forces the conclusion that those writing the Constitution deliberately refrained from the employment of those words, and thereby conclusively established it as a fact that it was intended to grant the right to select men other

than lawyers, if it were so desired, to be judges of the courts for which Article VI provides."

The State Court then proceeded to quote the constitutional qualifications of judges of inferior courts and continued the argument in this fashion:

> "The language of this section clearly gives the voters the privilege of electing as judges of these inferior courts whoever they please, so long as the person whom they elect is not less than thirty years of age, and a resident of the state not less than five years and for the circuit or district for which elected not less than one year. This privilege of the voters can neither be taken away nor abridged, because it is a privilege given these voters by the Constitution."

The Court then took up the Amendatory Act of 1937 in these words:

> "By the Amendatory Act of 1937 the Legislature undertakes to require the voters of Claiborne County to elect as their county judge one of a particular group selected by the Legislature, that group being restricted to 'practicing lawyers' who meet the constitutional requirements as to age and residency. This is an abridgement of the constitutional right given these voters to elect whomsoever they please as their County Judge, provided such person meets the age and residential qualifications required by the Constitution. If the Legislature can limit the selection of the voters to a list composed only of practicing attorneys, then, by the same token, it can further abridge this constitutional privilege by limiting them to the election of one of a list of attorneys who have practiced for such number of years as the Legislature may desire to fix. This constitutional right given the voters of Claiborne County to elect whoever they please within the constitutional age and residency requirements cannot be thus abridged by the Legislature."

In his Constitutional Limitations, 8th Edition, Vol. 1, Page 139, Judge Cooley nails this down with both certainty and finality when he says:

> "Another rule of construction is that when the Constitution defines the circumstances under which a right may be exercised, the specification is an implied prohibition against legislative interference to add to the condition."

The State Court thereupon ruled that no vacancy had existed in the County Court of Claiborne County and that Mason's commission to fill the alleged vacancy was ineffective. Your petitioner respectfully insists that the conditions pertinent to **Kivett v. Mason** are exactly parallel to those of the case at bar. He further respectfully insists that he was duly elected by the voters of Lawrence County to be Judge of the Court of General Sessions for Lawrence County; that his election was duly certified by the Lawrence County Election Commission, and that he was duly commissioned by the then governor, the Hon. Frank G. Clement, to assume the duties of the office. He further insists that no vacancy has existed in the office to which he was elected and that the commission from the present governor to one A. D. Lindsey to fill the alleged vacancy is void and ineffective.

The one point of constitutional law brought out in **LeFever v. Ware** (211 Tenn. 393; 365 SW2d 44 1963) was that the constitutional qualifications for inferior judges was minimum only and that the Legislature had the power and the authority to add to the 'minimum' qualifications provided it did so on a reasonable basis. Relying upon this case ~~solely~~ Solely, the Court had this to say:

> "Therefore, we believe that the standards or requirements as are now in Section 4 of Article VI of the Constitution are minimum only and that the Legislature possesses the necessary power and authority to add to these qualifications provided it does so on a reasonable basis." (Transcript, P. 94).

The Court did not determine just who should decide what is a reasonable basis upon which the Legislature has the power to add to the qualifications laid down by the Constitution. It is our contention that there is no such thing as a reasonable basis upon which a legislature may alter a state constitution either by taking from or adding to its provisions. A constitution may be revised but the revision must be accomplished by processes established by law, and to empower a legislature to alter the provisions of a constitution at will is to invite the erosion of all constitutional provisions and processes. It is our contention

that the Constitution of Tennessee was not hastily thrown together by a group of irresposible men but that it was severely tried in the crucible of men's souls and that it was adopted only after painstaking consideration of each of its provisions. We insist that those men knew what they were doing and that any attempt to empower a legislature to alter any constitutional provision is a usurpation of power which finds no justification anywhere.

The two cases cited by the State Court in support of this contention are, in our opinion, too puerile for present discussion and we dismiss them as a weak attempt to establish a precedent which would nullify the powerful precedents established in **Kivett v. Mason.** If the Court would have looked at **Moore v. Love** (171 Tenn. 693, 694), it would have found that this case, like the two upon which it relied, had no bearing upon the case at bar; but it would have found some positive statements of principle which might have been of interest. Take this one, for instance:

> "It has been frequently stated by this Court that it is not the function of the judicial branch of the government to inquire into the wisdom of the action of the legislative body. However, it is equally a cardinal principle of constitutional construction that the judiciary must not amend the Constitution by judicial decision." Page 693.

On page 694, the Court delivers itself of this pronouncement:

> "We adhere to the fundamental principal that, while the judiciary may not properly legislate nor determine the policy of legislation, in like measure, the Legislature may not invade the judicial sphere by limitations not directed or permitted by the charter of our liberties, the Constitution, itself."

If anything is clear in **LeFever,** it is that the Court has amended the Constitution by judicial decision which, according to the Court, itself, it is not allowed to do. When it conferred upon the Legislature the power to alter the Constitution as circumstances might warrant, it invaded "the judicial sphere by lim-

itations not directed or permitted" by the Constitution. That the Court was working toward a fore-ordained objective here is plain to all who will consider the case without prejudice.

Sixteen years passed between **Kivett v. Mason** and **LeFever v. Ware.** By this time the personnel of the Court had changed, as had its outlook and program, but the Constitution was still there. Just as long as the Constitution remains, just that long will **Kivett v. Mason** be a thorn in the flesh of those who seek to subvert the Constitution for their own selfish ends. In 1947, the Court went to bat vigorously for the right of the people to elect whomsoever they pleased as judges of inferior courts as long as the person elected met the constitutional qualifications as to age and residency. It was uncompromising in its declaration that an Amendatory Act requiring the judges of inferior courts to be lawyers was unconstitutional. By 1963, the Court was willing to go all out in its demands that the judges of inferior courts should be lawyers by constitutional requirement and, in order to suit the action to the word, the Court belabored itself to make the whole shoddy affair look legal when fifteen lawyers in White County undertook to deprive 12,000 voters of the right to elect the man of their choice as judge of an inferior court. The very thing which the Court of 1947 said could not be done was done in 1963. In Lawrence County, 14 lawyers undertook to strip 11,936 voters of the right to elect the man of their choice as judge of an inferior court. The tragedy is that, with the assistance of the State Court, the lawyers were successful in each case. We do not hesitate to aver that the actions of the Tennessee Supreme Court have not only denied the Constitution of the state but have also denied the provisions of the Constitution of the United States.

II

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law . . . The U. S. Constitution, Amendment XIV, Section 1.

> The United States shall guarantee to every state in this union a republican form of government . . .
> U. S. Constitution, Article IV, Sec. 4.

During the past twenty years, the Supreme Court of Tennessee has been called upon to deal with five cases where the local Bar Association has sought to deprive the people of the services of the men whom they elected to be judges of inferior courts. We have already discussed **Kivett v. Mason** and **LeFever v. Ware,** making further reference to them superfluous at this time. All of the others occurred in 1966. In the August election of that year, your petitioner and two other non-lawyer candidates were elected as judges of inferior courts in their respective counties. In each case, the local bar called for a declaratory judgement on the ground that those elected were not lawyers. All of the cases were decided adversely to the elected officials in the Chancery Courts of the counties concerned and each case was taken to the Supreme Court for further consideration. Two of the judges-elect were permitted to take over the duties of their respective offices, while your petitioner was denied the office to which he was elected.

Petitioner would respectfully show to this honorable Court that the State of Tennessee, through its highest Court, has denied not only the validity of its own Constitution but has also denied the validity of the Fourteenth Amendment to the Federal Constitution in that it has denied to petitioner the equal protection of the law and that, in doing so, it has abridged the constitutional rights guaranteed by Section 1 of the Fourteenth Amendment, which is forbidden by both State and Federal Constitutions. The fact that the judges-elect have been seated in three counties and barred in two other counties denies the doctrine of the equal protection of the law, and no legalistic jugglery can change the fact that your petitioner has been, and is being, denied his rights under both State and National Constitutions. The State of Tennessee has 95 counties. In 46 of these counties, non-lawyers are serving as judges of General Sessions Courts. Few counties have a lawyer serving as County Judge and it is a well known fact that some counties in Tennessee do not have a single lawyer. In many counties, no lawyer will accept the office of General Sessions Judge for the reason

that he can make more money practicing law. In most counties where the Sessions Judge is a lawyer, he is a broken-down hack who has so lost public confidence that he can no longer make ends meet as a practicing lawyer, for which reason he is glad to drop into a slot which guarantees him a weapon against the wolf at the door. Wayne County, just west of Lawrence, has only two lawyers and neither of them could be induced to desert his law practice in order to run for the office of Sessions Judge. In view of such conditions all over the state, it is impossible to create the uniformity in the Judiciary which the Bar Associations seek, for which reason they have sought to extend their control by the simple expedient of an unconstitutional Private Act.

In the elections of 1966, the people of this county were not hoodwinked. They voted for what they wanted and knew what they were voting for. They wanted a change in the General Sessions Court and they knew they would never get it as long as the local Bar Association could keep one of its own members on the bench. The Bar was determined to retain its control over the judicial machinery of the county, while the people were just as determined to break that control. The issues were widely publicised and the constitutionality of the Private Act requiring the judge of the court to be a lawyer was discussed widely by both sides. To say that the people were in ignorance of the issues would be to belie the facts and, as they became more informed, they became more vociferous in their demands that the judge of the Sessions Court be a man who was not connected with the Bar Association nor beholden to it. It is somewhat significant that the two candidates who were non-lawyers were far in the lead, while the two who were lawyers fell far behind in the vote count. Your petitioner respectfully contends that the people were within their constitutional rights when they went to the polls and cast their vote to break the power of a machine which had sunk to a new low in judicial depravity and was making mockery of justice.

The people are sovereign. No court or legislature is sovereign. The people established courts and legislatures as instruments of their will and no court or legislature has the right under

any circumstances to slap down the people from whom it sprang. No court or legislature has the right to reform or abolish the government when it is no longer responsive to its will, but the people do have that inalienable right, as established in Article I, Section 1, of the State Constitution. In order to make its provisions hold against any assault, the Constitution declares, in Article I, Sec. 16, that

> The declaration of rights hereto prefixed is declared to be a part of the Constitution of this state, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained is excepted out of the general powers of the government and shall forever remain inviolate.

The Federal Government has obligated itself, in Article IV, Section 4 of its Constiution, to guarantee to each state of the union a republican form of government. A republic is a society wherein the powers of government are vested in the duly constituted representatives of a majority of the people, with a proper regard for the rights, privileges and immunities of the minority. These representatives are chosen by a majority vote of the people in free elections but, after a century of distortion of the doctrine of "states' rights," the states of the South find themselves in the almost despotic grip of circumstances which render the doctrine of government by free men almost meaningless. The instant case is one of many in which the electorate have been stripped of the right to choose their own representatives in free elections, and there have been times when the scheme of conniving politicians would have been successful had not the federal government, through its highest Court, stepped in and honored its commitments to guarantee a republican form of government. In this connection, we cite **Bond vs. Floyd**, 385 U.S. 116; 87 S. Ct. 339. Julian Bond was duly elected to a seat in the Georgia Legislature and was denied the right to assume the duties of the office by a group of state politicians who had an axe to grind. They invoked certain laws but every one knew that this was only a subterfuge and that the controlling reasons behind the court fight had racial overtones. The State of Georgia would have denied the elected official his office but the Federal Government, having guaranteed

free elections under republican processes, reversed all lower courts and ordered the elected official seated. It could not have done otherwise. The case of **LeFever v. Ware,** 211 Tenn. 393; 365 SW2d 44 (1963), was one in which the local Bar Association invoked a Private Act to rid itself of a man who was not acceptable. In the instant case, the local Bar Association invoked a Private Act to rid itself of a duly elected official who was not only not acceptable but whose campaign pledges to rid the Court of its corruptions were highly obnoxious. Five times within a period of twenty years, the people of Tennessee have had to fight through the state Courts for the right to have their duly elected officials seated. By the shrewd use of the political device known as the Private Act and by the secret and clever manipulation of the Courts, the politicians have been able to transfer the power once held by the people over to themselves. It has been gradual but it has been sure and deadly.

The issues which have been touched upon in this Brief require further devolpment in oral argument. The Brief has attempted only to show to this honorable Court that there is ample ground here for the intervention of the High Court looking to the correction of injustices which has been denied by the lower Courts through political intrigue.

The premises considered, your petitioner would pray that a Writ of Certiorari issue to the Supreme Court of Tennessee and that petitioner be permitted to plead his cause before this honorable Court.

In view of the fact that petitioner is being deprived of his rights under both State and Federal Constitutions and that such a condition has existed since September 1, 1966, petitioner asks for an immediate hearing under the emergency conditions which now exist.

APPENDIX

ATLAS PERRY, ET AL

vs

LAWRENCE COUNTY ELECTION COMMISSION, ET AL

LAWRENCE EQUITY

IN THE SUPREME COURT OF TENNESSEE, NASHVILLE

APPEAL FROM THE CHANCERY COURT
OF LAWRENCE COUNTY,
HONORABLE JOHN D. TEMPLETON, CHANCELLOR

OPINION FILED

For Atlas Perry, et al., Honorable A. D. Lindsey
and Noble L. Freemon, both of Lawrenceburg.

For Lawrence County Election Commission, et al.,
Honorable Arnold Peebles, Jr., and Charles A. Trost,
of Columbia.

JUDGMENT AFFIRMED

OPINION.

This case presents the sole question of whether the Judge of the General Sessions Court of Lawrence County is required to be a person licensed to practice law in Tennessee. The court was created by Chapter 55, Private Acts of 1943 and the section of this Act pertinent to this issue is as follows:

> Section 12. Be it further enacted, That there shall be a Judge for said court, who shall be a person licensed to practice law in Tennessee, and with all other qualifications and the same term of office as provided by the Constitution of the State of Tennessee for inferior courts; and the oath shall be the same as that prescribed for Circuit Judges and Chancellors.

The constitutional requirements of the judge of this court are contained in Article VI, Section 4, of the Constitution of Tennessee as follows:

> The judges of the Circuit and Chancery Courts, and of other inferior courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every Judge of such courts shall be thirty years of age, and shall before his election, have been a resident of the state for five years and of the circuit or district one year. His term of service shall be eight years.

The question presented is, does the Legislature have authority, in addition to the qualifications required of the judge of the General Sessions Court for Lawrence County by Section 4, Article VI of the Constitution, to require the further qualification said Judge be a person licensed to practice law in Tennessee? This case is controlled by the holding in **LeFever v. Ware,** 211 Tenn. 393; 365 SW2d 44 (1963) wherein it is said:

> Therefore, we believe that the standards or requirements as are now in Section 4 of Article VI of the Constitution are minimum only and that the Legislature possesses the necessary power and authority to add to these qualifications provided it does so on a reasonable basis . . . 211 Tenn. 409.

This holding is based on the view that the State of Tennessee is a government of general powers and the Constitution of Tennessee is a limitation on and not the source of the power of the people acting through their representatives, the Legislature. This view was expressed in the very early case of **Bell v. The Bank of Nashville,** 7 Tenn. 269 (1823), wherein it was said, "The Legislature of Tennessee, like the Legislatures of all other sovereign states, can do all things not prohibited by the constitution of this state or of the United States." The same view was expressed in the recent case of **Frazer v. Carr,** 210 Tenn. 565; 360 SW2d 449 (1962), wherein it was said, "To be invalid a statute must be plainly obnoxius to some constitutional provision."

This requirement by the Legislature the Judge of the General Sessions Court of Lawrence County be a person licensed to practice law in Tennessee is in no way obnoxious to any provision of our Constitution and such is a reasonable requirement.

The decree of the Chancellor permanently enjoined and restrained J. P. Kimbrell, a person not licensed to practice law in Tennessee, from holding or attempting to hold the office of Judge of the General Sessions Court for Lawrence County or from assuming or performing any of the duties of same.

The decree of the Chancellor is affirmed.

Ross W. Dyer, J.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ATLAS PERRY, ET AL

vs.

LAWRENCE COUNTY ELECTION

COMMISSION, ET AL

LAWRENCE EQUITY

PETITION TO REHEAR

May it please the Court:

Appellant, J. P. Kimbrell, respectfully petitions this honorable Court for a rehearing of the above styled cause, and in support of his petition states to the Court as follows:

I

Appellant, in his Assignments of Error, Brief and Argument, raised two question relating to Appellant's qualification to serve as Judge of the General Sessions Court of Lawrence County, although not an attorney, as required by the Private Act:

1) Is the Private Act unconstitutional as being in violation of Article VI, Section 4, of the Constitution of Tennessee, which sets out the qualifications of judges of inferior courts (Assignment of Error, Nos. 1 and 2).

2) Is the Private Act unconstitutional as being in violation of Article XI, Section 8, of the Constitution of Tennessee, which prohibits special legislation (Assignment of Error No. 4).

Both questions were presented in Appellant's Brief and oral argument, both were discussed, and authorities cited.

The Court, in its opinion, decided the first question adversely to the Appellant, but did not mention, discuss or rule upon the second question, although the questions present separate and independent legal issues.

II

Article XI, Section 8, of the Tennessee Constitution provides, in relevant part, as follows:

> "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land . . ."

The Supreme Court of Tennessee, in construing this provision, has said:

> "Our courts have consistently stricken down and declared invalid special legislation and Private Acts applicable to a single county which **in any way** (Emphasis supplied) alter or suspend the general law." **Board of Education of Memphis, Versus Shelby County** 339 SW2d 569 578 (1960).

The general law of Tennessee requires that the qualifications of the Judges of General Sessions Courts shall be those set out in Constitution of Tennessee for inferior courts. T.C.A. Sec. 16-1105. This Court, in decisions rendered this term, has ruled that General Sessions Judges sitting in Cocke (Population 23,390, 14 attorneys) and Sumner (Population 36,217, 20 attorneys) Counties did not have to be attorneys. There is no reasonable basis shown for different treatment of Lawrence County with 15 attorneys and 28,049 population.

This Court has ruled that Private Acts imposing qualifications greater than those imposed by general law on members of county school boards, **Phillips v. West,** 213 SW2d 3 (Tenn. 1948) and county school superintendents, **Gallien v. Miller,** 92 SW2d 403 (Tenn. 1936) are unconstitutional as being in violation of Article XI, Sec. 8, Tennessee Constitution.

III

Appellant says he is entitled to an adjudication by this Court of the issues raised in this appeal and prays that this Court will rehear and reconsider this case, to the end that these issues may be fully considered and answered.

Respectfully submitted:

Arnold Peebles, Jr.

Charles A. Trost

Attorneys for Appellant.

REPLY TO PETITION TO REHEAR

The Appellant, Atlas Perry, et al., has filed a petition to rehear correctly insisting, in our original opinion, we did not rule directly upon the following assignment of error:

> Is the Private Act unconstitutional as being in violation of Article XI, Sec. 8, of the Constitution of Tennessee, which prohibits special legislation?

In **LeFever v. Ware,** 211 Tenn. 393; 365 SW2d 44 (1963) one of the issues was the constitutionality of Section 15, Chapter 35 of the Private Acts of 1953, which required the Judge of the General Sessions Court of White County to be a licensed attorney in this state. The Court said:

> "We do not believe that either of said Acts (the private act or a public act) is violative of Article XI, Section 8, which prohibits class legislation. Under the Acts, every person who is authorized to practice or who may hereafter be authorized to practice in the Courts of Tennessee is eligible to serve as a judge. There is nothing unreasonable or arbitrary about this classification of said Sec. 8 of Article XI which prohibits only those classifications which are unreasonable and arbitrary." 211 Tenn. 408; 365 SW2d 51.

The petition to rehear is denied.

(Transcript, pp 105, 106)

The State Court does not deny that petitioner was duly elected by the voters of Lawrence County, neither does it attempt to deprive him of his office on any ground other than the fact that he is not a lawyer. Citation after citation in the Brief has shown that the men who wrote the Constitution deliberately refrained from requiring the Judge of an inferior Court to be a lawyer. The Supreme Court in 1947 declared that a Private Act which required a Judge of an inferior court to be a lawyer was unconstitutional (Kivett v. Mason, 186 Tenn. 558; 206 SW2d 789). The Judge of the General Sessions Court of Lawrence County sits in judgment only on cases involving public drunkness, traffic violations, illegal hunting, etc., and is never called upon to judge murderers, rapists or arsonists. On

the other hand, the same lawyers who would deny a non-lawyer the right to sit as Judge of an inferior court do not hesitate to bring into court the most illiterate backwoodsmen to be found to sit as jurors on cases involving murder, rape, arson or any other felony which men commit. No complaint is ever heard that these jurors are non-lawyers. There is a reason for these inconsistencies for which no citation to Tenessee Reports or to SW2d is offered.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. .....

ATLAS PERRY, et als.,
Respondents,

v.

LAWRENCE COUNTY ELECTION COMMISSION, et als.,
Petitioner.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, J. P. Kimbrell, seeks a review of the final judgment of the Tennessee Supreme Court filed January 12, 1967, not yet officially reported but unofficially reported in 411 S. W. 2nd 538, and included in the appendix to the petition for certiorari. Petition to rehear was denied by the Tennessee Supreme Court on March 1, 1967, and is unofficially reported on pages 539-40 of the above citation.

JURISDICTION.

Petitioner seeks to invoke jurisdiction of this Honorable Court pursuant to Section 1254 (1), U. S. C. A. Although this section pertains to certiorari to the Federal Courts of

Appeal, it is conceded that in a proper case this Court would take jurisdiction on petition for certiorari to a state court if a substantial federal question deemed "special and important" were involved, but respondents respectfully insist that at no time in the State proceeding, either in the trial or appellate courts, did petitioner raise or present for determination a federal constitutional question. Petitioner's allegation to the effect that the Supreme Court of Tennessee withheld and denied to him the rights and privileges guaranteed to him by the Constitution of Tennessee, by Section 1 of the Fourteenth Amendment to the Constitution of the United States and by Article IV, Section 4 of the same document, would appear to be frivolous and without substance in the light of the true legal issues involved in this cause, which were, does Section 12, Chapter 55 of the Private Acts of Tennessee for the year 1943 contravene any provision of the Tennessee Constitution or general statutes of the State of Tennessee?

BRIEF AND ARGUMENT.

Petitioner seeks to invoke jurisdiction of this Honorable Court upon the ground that the decision of the court of last resort of the State of Tennessee in holding Section 12, Chapter 55 of the Private Acts of Tennessee for the year 1943 valid and compatible with the Constitution and Statutes of the State of Tennessee, violated his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States. Petitioner also claims his rights and privileges under Article 4, Section 4 of the Federal Constitution were violated. Respondents respectfully contend that at no time or step in the State proceeding was there a Federal question presented for consideration and though Petitioner alleges that his federal rights were denied him for the first time in his petition for certiorari, it is difficult indeed to see how a decision of the Tennessee Supreme Court passing on a provision of the Constitution and a Statute of the State of Tennessee in accordance with its regularly established procedure, could have deprived petitioner, who was from the very inception of the cause, represented by competent, experienced and able lawyers, of due process or equal protection of law by simply sustaining the validity and constitutionality of a Statute of the State of Tennessee. It is even more difficult to comprehend Petitioner's contention that said decision violated the federal constitutional guaranty to the States of the Union against invasion, domestic violence and interference with its republican form of government as set forth in Article 4, Section 4 of the United States Constitution. Therefore respondents insist that no substantial federal constitutional question is involved in this cause.

In his petition to rehear, Appendix, page (4a), petitioner succinctly states the issues involved in this cause as follows:

(1) Is the Private Act unconstitutional as being in violation of Article VI, Section 4 of the Constitution of

Tennessee, which sets out the qualifications of judges of inferior courts, and,

(2) Is the Private Act unconstitutional as being in violation of Article XI, Section 8 of the Constitution of Tennessee, which prohibits special legislation?

The Supreme Court of Tennessee decided both questions adversely to petitioner, saying:

> "This case is controlled by the holding in **LeFever v. Ware**, 211 Tenn. 393 S. W. 2nd 44 (1963), wherein it was said: Therefore, we believe that the standards or requirements as are now in Section 4 of Article 6 of the Constitution are minimum only and that the Legislature possesses the necessary power and authority to add to these qualifications provided it does so on a reasonable basis, * * * 211 Tenn. 409, 365 S. W. 2nd 51."

As to the second state constitutional question raised by petitioner, the Tennessee Supreme Court in its decision on the petition to rehear quoting from LeFever, supra, said:

> "We do not believe that either of said Acts (the private act and a public act) is violative of Article 11, Section 8 which prohibits class legislation. Under the Acts every person who is authorized to practice or who may hereafter be authorized to practice in the Courts of Tennessee is eligible to serve as a Judge. There is nothing unreasonable or arbitrary about this classification of said Section 8 of Article 11 which prohibits only those classifications which are unreasonable and arbitrary." 211 Tenn. 408, 365 S. W. 2nd 51.

Article VI, Section 1 (Volume 1, TCA, p. 519) of the Constitution of Tennessee provides that the judicial power of the State of Tennessee shall be vested on one Supreme Court and in such Circuit, Chancery and other inferior courts as the Legislature shall from time to time ordain

and establish. Such an inferior court was established by the Tennessee Legislature in the enactment of Chapter 55 of the Acts of 1943, creating the General Sessions Court of Lawrence County, Tennessee. This act in addition to the constitutional requirements provided that the Judge of such court be licensed to practice law in Tennessee. Now the sole question raised by petitioner was that this act was unconstitutional as being in violation of Article VI, Section 4 of the Constitution of Tennessee as an attempt to enlarge the qualifications of said Judge above those provided in said constitutional provision, which only provided that such Judge be thirty years of age, a resident of Tennessee for 5 years and of the circuit or district one year. Upon consideration of these issues the Supreme Court of Tennessee held the Act valid and constitutional and no federal question was raised or at anytime considered by the Court.

Petitioner mentions the case **Kivett v. Mason**, 185 Tenn. 558, 206 S. W. 2nd 789, wherein the Supreme Court of Tennessee rightly held that a Private Act requiring the County Judge of Claiborne County to be a "practicing attorney" was unreasonable and therefore invalid. In this situation (Kivett v. Mason, supra) the Tennessee Supreme Court was not confronted with the question of whether or not a statutory provision simply requiring that the Judge be a "licensed lawyer" would be reasonable and therefore valid. However in the later case of **LeFever v. Ware**, 211 Tenn. 393, 365 S. W. 2nd 44, the Court did have this question and held that such a provision was reasonable and therefore constitutional.

It is a rule of almost universal application that federal questions not raised in the state court cannot be reviewed in the United States Supreme Court. As this Court stated in **Penn. R. R. Co. v. Illinois Brick Co.**, 56 S. Ct. 556, 297 U. S. 447:

> "As the highest Court of the State declined to consider them because not raised in the Circuit Court

or presented to it in accordance with practice that unquestionably was well established and reasonable, this Court is without jurisdiction to consider either of them."

To the same effect is the holding in **Hanson v. Denckla,** 78 S. Ct. 1228; 357 U. S. 235. Moreover petitioner contends in his petition herein that the Tennessee Supreme Court was "much in error" in basing its decision on LeFever instead of his contention of the law as announced in prior authorities. In this connection this Court said at page 454 in the case of **Brinkerhoff-Farris Trust & Savings Co. v. Hill,** 50 S. Ct. 451; 281 U. S. 673:

"It is true that the Courts of the States have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of the state courts is limited to their decision on federal questions, and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court."

In **Highland Farms Dairy, Inc., et als. v. Agnew, et als.,** 57 S. Ct. 549; 300 U. S. 308, this Court at page 552 said:

"A judgment of the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere."

Also at page 551:

"The statute challenged as invalid is one adopted by the state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing

in the distribution here attempted supplies the basis for an exception. The Statute is not a denial of a republican form of government. Constitution, Article 4, Section 4, even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the Courts."

CONCLUSION.

Thus, it is insisted by counsel for respondents that the petition shows upon its face that this matter is not a proper case for the granting of certiorari; that no federal question of substance has been presented at anytime during the state proceedings and not sufficiently raised in the petition for certiorari; that the whole matter is simply that the Supreme Court of Tennessee in its construction of the State Statute in question held contrary to Petitioner's contention and Petitioner would now ask this Honorable Court to construe the State Statute. Respondents insist however that this Honorable Court would by its own decision look to the construction placed upon the matter by the Supreme Court of Tennessee and finding no federal question involved, would dismiss the petition.

Respectfully submitted,

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A. D. LINDSEY,
Lawrenceburg, Tennessee,

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NOBLE L. FREEMON, SR.,
Lawrenceburg, Tennessee,
Counsel for Respondents,
Atlas Perry, et als.

Certificate of Service.

I the undersigned hereby certify that I forwarded a true copy of the within answer to petition for Writ of

Certiorari to J. P. Kimbrell, Petitioner, West Point, Tennessee 38486, on this 7th day of June, 1967.

A. D. Lindsey,
Counsel for Respondents.